UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

LARRY JUNIOR WEBSTER,

Petitioner,

v.

JILL L. BROWN, Warden of the California State Prison at San Quentin, et al,

Respondents.

_____/

NO. CIV. S-93-306 LKK/DAD DP

O R D E R

Pending before the court is a motion for reconsideration of the magistrate judge's order granting an evidentiary hearing on three of petitioner's claims. These claims include petitioner's ineffective assistance of counsel claim, the claim that California failed to properly narrow the pool of death-eligible cases, and the claim that petitioner was denied meaningful appellate review. As explained below, the motion is denied.

In non-dispositive matters, "[t]he district court must defer to the magistrate judge's orders unless they are clearly erroneous

or contrary to law." Grimes v. San Francisco, 951 F.2d 236, 240 (9th Cir. 1991). Only if the district court is left "with the firm and definition conviction" that the orders were mistaken should it set them aside. United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). This is a particularly high standard given the broad judicial discretion afforded with respect to holding evidentiary hearings. See Pagan v. Keane, 984 F.2d 61, 64 (2d Cir. 1993) ("In every case he has the power, constrained only by his sound discretion, to receive evidence bearing upon the applicant's constitutional claim.") (quoting Townsend v. Sain, 372 U.S. 293, 318 (1963)).

First, respondent argues that petitioner's ineffective assistance of counsel, as supported by current declarations, is unexhausted and that an evidentiary hearing is therefore inappropriate. The court disagrees. First, this is not a case where the petitioner negligently failed to develop the facts supporting a claim at a state court evidentiary hearing. Cf. Keeney v. Tamayo-Reyes, 540 U.S. 1 (1992).[1] Rather, the petitioner here actually sought -- but was denied -- the opportunity to develop the facts at a state court hearing. Second, only claims must be exhausted, not evidence or exhibits. See Austin v.

[1] Furthermore, in Keeney, the Supreme Court addressed the situations in which an evidentiary hearing was mandatory but did not change the law with respect to when an evidentiary hearing would be permissible. 504 U.S. at 23 ("[D]istrict courts . . . still possess the discretion, which has not been removed by today's opinion, to hold hearings even where they are not mandatory") (O'Connor, J., dissenting).

Swenson, 522 F.2d 168, 170 (8th Cir. 1975) ("Exhaustion does not require that all of the evidence shall have been submitted."); Nelson v. Moore, 470 F.2d 1192, 1197 (1st Cir. 1972). Here, petitioner is merely offering support for the factual allegations underlying the ineffective assistance of counsel claim made in state court.

Next, respondent argues that the hearing on petitioner's claim that California's death penalty scheme fails to meaningfully narrow those eligible for the death penalty is pointless, because the claims has already been rejected by the Ninth Circuit. Respondent's position is that the claim is purely a question of law. The court disagrees. Petitioner is not mounting a facial attack on California's death penalty scheme; rather, he is merely arguing that its enforcement is unconstitutional. See People v. Ballard, 794 N.E.2d 788, 826 (Ill. 2002) (McMorrow, J., concurring) ("the question of whether the constitutional requirement of narrowing has occurred is a factual one"). Accordingly, an evidentiary hearing is not inappropriate.

Finally, respondent maintains that an evidentiary hearing on the denial of meaningful appellate review is an abuse of discretion, because petitioner has not come forward with a basis for the claim. To the contrary, petitioner has indicated that when petitioner's death penalty appeal was pending, three justices on the California Supreme Court were ousted in a judicial retention election. Petitioner further alleges that his "appeal was heard by the new court, suitably reformulated to reflect a specific

political agenda to affirm death sentences." Opp'n to Mot. at 7. While not passing on the merits of the claim, the court finds that it was not an abuse of discretion (much less a clearly erroneous abuse of discretion) for the magistrate judge to err on the side of caution and permit petitioner to present evidence in support of his claim at a hearing.

The motion for reconsideration is denied.

IT IS SO ORDERED.

DATED: March 29, 2007.

LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES DISTRICT COURT